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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA PATSY,

Petitioner

v.

BOARD OF REGENTS OF THE STATE OF FLORIDA, A BODY CORPORATE, FOR AND ON BEHALF OF FLORIDA INTERNATIONAL UNIVERSITY,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Charles E. Sims, American Civil Liberties Union, Counsel for Petitioner, and by Jeffrey H. Klink, Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICUS

Americans for Effective Law Enforcement, Inc. (AELE), as a citizens group, is interested in establishing a body of law making the police and correctional efforts more effective, in a constitutional manner.

AELE is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in

its by-laws, one of the purposes of AELE is to assist the police, the prosecution and the courts in promoting a more effective and fairer administration of the criminal justice system.

In furtherance of this objective, AELE seeks to represent, nationwide, the concern of the average citizen with the problems of crime, police effectiveness to deal with crime, and the effectiveness of correctional administrators in working with prisoners. It also provides legal research assistance in support of responsible law enforcement and correctional activities, principally through the *amicus curiae* process in the courts.

Americans for Effective Law Enforcement, Inc. steadfastly opposes racial and sexual discrimination of any and all types. Our interest in this case arises not from its specific facts, but from the importance of effective correctional administration and the adverse impact that an unnecessarily broad interpretation of 42 U. S. C. § 1983 will have on the effectiveness of our prison systems and the federal courts. We are also concerned with employment matters involving the police. It is generally recognized that the number of law enforcement officers challenging their superiors on relatively minor matters in § 1983 actions, rather than utilizing established administrative grievance procedures, is growing rapidly and threatens to undermine the stability of our law enforcement agencies.

While the instant case obviously does not involve a prisoner civil rights or police employment suit, cases founded on § 1983 have been applied as precedent to such suits regardless of the subject matter. *Amicus* believes it is imperative that the Court take the current status of prisoner civil rights suits and other law enforcement matters into consideration when hearing any case involving § 1983. When reaching a decision on the law founded on this statute, *amicus* respectfully requests the Court to consider the policy issues, in particular the possible adverse effect of any further deterioration of the exhaustion doctrine in § 1983 suits.

FACTUAL AND PROCEDURAL SETTING OF THIS CASE

On February 7, 1979, Petitioner Patsy filed a complaint in the United States District Court for the Southern District of Florida, alleging that the Respondent had denied her employment opportunities solely because of her race and sex. Injunctive relief and damages were sought pursuant to 42 U. S. C. § 1983.

Respondent moved to dismiss the complaint because plaintiff had failed to exhaust available administrative remedies. On July 9, 1979, the District Court granted the motion to dismiss.

On appeal, a panel of the former Fifth Circuit Court of Appeals reversed the District Court and remanded. The former Circuit Court subsequently granted Respondent's motion for a rehearing *en banc* and reversed the panel, upholding the District Court. Petition for a writ of certiorari to the newly-organized United States Court of Appeals for the Eleventh Circuit was filed, which petition was granted.

ARGUMENT

ABOLITION OF THE EXHAUSTION OF ADMINISTRATIVE REMEDIES REQUIREMENT IN § 1983 CASES, WHERE ADEQUATE ADMINISTRATIVE PROCEDURES ARE AVAILABLE, WOULD BE CONTRARY TO JUDICIAL ECONOMY AND SOUND PUBLIC POLICY.

As noted in the Interest of Amicus section, *supra*, AELE is vitally concerned with the anticipated deleterious effect of a holding creating a no-exhaustion requirement in § 1983 cases, and in particular the impact of frivolous prisoners' suits on the federal judiciary. While § 1983 cases include a plethora of subject matter, opinions in one type of case are often viewed by the lower courts as precedent in all § 1983 cases. It is, therefore, the intent of *amicus* to present the Court with arguments from the point of view of sound criminal justice administration in regard to exhaustion of administrative remedies in § 1983 cases.

As is the custom of AELE when appearing as *amicus curiae* before this Court, we will not repeat at length the legal arguments made by the Respondents in this case. Concerning the legal analysis of the issues in this case, we regard the majority opinion by Circuit Judge Roney to be exceptionally well-reasoned and comprehensive. *Amicus* readily endorses this opinion and refrains from repeating it as well.

Traditionally, state prisoners have preferred the federal court as a forum for the redress of grievances by bringing habeas corpus actions pursuant to 28 U. S. C. § 2254 (1976). However, in growing numbers these convicted criminals have expressed their preference for § 1983 suits. Such actions allow for equitable relief, see *Taylor* v. *Perini*, 413 F. Supp. 189 (N. D. Ohio 1976) and *Collins* v. *Schoonfield*, 344 F. Supp. 257 (D. Md. 1972); as well as money damages, *see Sostre* v. *McGinnis*, 442 F. 2d 178 (2d Cir. 1971), *cert. den.*, 404 U. S. 1049 (1972), and *Basista* v. *Weir*, 340 F. 2d 74 (3d Cir. 1965). And, since this Court's decision in *Lynch* v. *Household Finance*

Corp., 405 U. S. 538 (1972), there is no minimal jurisdictional amount for civil rights property claims.

Additionally, § 1983 actions are preferred to habeas corpus relief because the civil discovery procedures are liberal and class actions are permitted. However, as one commentator has noted:

> The most important advantage section 1983 has over the habeas corpus action is that the prisoner need not exhaust his state judicial or administrative remedies prior to bringing his suit in federal court. In direct contrast, the habeas corpus statute explicitly requires a prisoner to exhaust available state remedies prior to seeking federal judicial relief. (footnotes omitted) 11 Cumberland Law Review 369 (1980).

These procedural advantages, and the lack of any meaningful procedural restraints, have resulted in an almost geometric increase in federal court caseloads. Prior to analyzing specific data and cases which illustrate this point, *amicus* asks the Court to consider the following observations from nearly a decade ago.

In 1973, Judge Ruggero J. Aldisert stated:

> [P]risoners' petitions continue to inundate the federal courts, pathic handwritten grievances; some very real; some rather illusory; some with genuine constitutional issues; some merely stating disagreements with administrative decisions. This litigious flood consumes many judicial manhours and challenges the abilities of federal courts to cope with their own calendars. Mr. Justice Powell's recent statement concerning state habeas corpus in the federal system is equally applicable to prisoners' civil rights claims: "The current flood of petitions . . . already threatens—because of sheer volume—to submerge meritorious claims and even to produce a judicial insensitivity to . . . petitioners." 1973 Law and Social Order 557, 566.

The following year, Chief Judge Northrop, in the District Court's opinion in *McCray* v. *Burrell*, 367 F. Supp. 1191 at 1196

(D. Md. 1973), squarely addressed the problem that the current system has created when he stated:

> This Court is not implying that all prisoner civil rights suits are without merit, or that penal institutions . . . are without sin. But it is suggesting that these suits will continue to consume more and more of the federal courts' time, with the result that it will take longer and longer to provide relief for those prisoners who are actually being deprived of their rights.

The statistical data readily illustrates the apprehensions expressed by many jurists. The yearly increases in the number of prisoner civil rights actions have been staggering. In 1966, there were 218 civil rights suits brought by state prisoners. By 1972, this number had grown to 3,348 suits, or a 1,536 per cent increase! In 1972, there were a total of 96,173 civil suits filed in the federal district courts. Seventeen per cent, or 16,267, of these actions were prisoner petitions, including habeas corpus and civil rights act filings. 1973 Law and Social Order 557 at 567. Furthermore, prisoners' petitions account for a dramatically disproportionate increase in the federal caseload. It was reported that, " * * * if prisoner petitions were dropped from federal court statistics the number of civil cases filed in the first six months of fiscal year 1973 would have been 39,533, only 1.1 per cent more than the comparable figure (excluding prisoner petitions) from the last year." 1973 Semi-Annual Report of the Director of the Administrative Office of the United States Courts 20.

One would expect that after a reasonable period the number of state prisoner civil rights suits in the federal system would begin to level off. Nevertheless, recent data indicates that the increases in such actions are progressive and unrelenting. By 1977, (July 1, 1976 to June 30, 1977) the number of these suits had mounted to 7,752, more than doubling in the five year period from 1972, and representing a 3,456 per cent increase over the number of petitions brought in 1966. See 1977 Federal Judicial Workload Statistics, at Table 15, and 33

Arkansas Law Review 91 (1979). In 1977, state prisoner civil rights actions reached 6.5 per cent of all civil suits in the federal District Courts.

In the decade of the 1970's state prisoner civil rights actions increased from 2,030 in 1970 to 11,195 in 1979, a 451.5 per cent increase! *Amicus* noted *supra* that prisoners are increasingly opting for the § 1983 suits as opposed to habeas corpus petitions. While the § 1983 suits increased over 450 per cent, the number of habeas corpus petitions actually decreased from 9,036 in 1970 to 7,133 in 1979, a 21.4 per cent decline. 1979 Annual Report of the Director of the Administrative Office of the United States Courts at 61; *see also* 11 Cumberland Law Review 369 (1980).

Focusing on the former Fifth Circuit, from which the present case comes, the District Courts have shouldered a disproportionate share of the burden of state prisoner civil rights suits. In 1979, the courts of that Circuit had 2,894 § 1983 suits filed by prisoners, representing an increase of 300 such petitions over 1978. See 11 Cumberland Law Review 369, n. 2 (1980).

The most current data shows that the increase in state prisoner § 1983 actions continues in a dramatic fashion in all the District Courts. Data of July 1 to June 30 for the following years illustrates this increase:

1977—7,752
1978—9,730; 25.5% annual increase
1979—11,195; 15.1% annual increase
1980—12,397; 10.7% annual increase
1981—15,639; 26.2% annual increase
1981 Annual Report of the Director, Administrative Office of the United States Courts at Table 21.

As commentators and jurists have noted, the sheer volume of these cases has strained the limited resources of the federal courts. It does so at a time when federal dockets continue to grow at an alarming pace. As pointed out by Chief Justice Burger in his most recent annual year end report on the

judiciary, during the last judicial year Court of Appeals filings grew almost 14% to 26,362 and District Court filings rose 7% to 211,863. Chicago Daily Law Bulletin, December 28, 1981, p.1.

Yet the most disturbing aspect of this invitation to convicted criminals to exploit § 1983 remedies is the almost universal lack of truly meritorious claims. In 1972 (when prisoners' petitions were one-fifth of what they are today) the Freund Committee made the following observation:

> The number of these petitions found to have merit is very small, both proportionately and absolutely. But it is of the greatest importance to society as well as to the individual that each meritorious petition be identified and dealt with. And yet it seems a misallocation of resources to impose the burden of sifting through the mass of these petitions on federal judges, let alone Supreme Court justices.
>
> Administrative Office of U.S. Courts, Federal Judicial Center Report of the Study Group on the Caseload of the Supreme Court (1972) at 13.

During debates on the Ku Klux Klan Act of 1871 (the predecessor to § 1983), Ohio Senator Thurman expressed concern that a federal claim could be made for five cents. See 33 Arkansas Law Review 91, 92 (1979). Thurman was close. Indeed, one hundred years later we find prisoner civil rights actions for seven packs of cigarettes, *Russell* v. *Bodner*, 489 F. 2d 280 (3d Cir. 1973); $3.52, *Weddle* v. *Director, Patuxent Inst.*, 436 F. 2d 342 (4th Cir. 1970), *vacated*, 405 U. S. 1036 (1972); postage worth $2.47, *Brooks* v. *Steele*, No. 78-8296, *petition to appeal in forma pauperis granted, appeal dismissed* (5th Cir. 1978); $68.35, *Diamond* v. *Thompson*, 523 F. 2d 1201 (5th Cir. 1975); an office supply catalog, *Nickens* v. *White*, 536 F. 2d 802 (8th Cir. 1976); $2.46, *Rhodes* v. *Sigler*, 448 F. 2d 1237 (8th Cir. 1971); stereo equipment, *Secret* v. *Brierton*, 584 F. 2d 823 (7th Cir. 1978); and hobby materials, *Parratt* v. *Taylor*, ____ U. S. ____ (1981).

While judicial economy is perhaps the most compelling policy reason to require exhaustion of administrative remedies where those remedies are deemed adequate, numerous other

salient factors strongly suggest the need for imposition of an exhaustion requirement.

The point-of-view most often overlooked in the context of § 1983 suits is the impact upon prison employees. Judge Aldisert, however, has discussed this impact:

> Despite *McNeese, Domico,* and *Wilwording,* there appears to be no rational relationship between federal civil rights actions for personal money judgments against underpaid prison guards, wardens, and deputy wardens and the reluctance of state legislatures to spend the funds needed to clean up horrible conditions in the prisons. The reverse is more likely true. Exposure to a personal money judgment probably causes capable personnel to leave prison administration and discourages able men from entering.
> 1973 Law and Social Order 557 at 565-6.

Judge Aldisert also notes that ready access to the federal courts has crippled prison discipline, demoralized guards and given the prison "toughs" an inordinate degree of authority. *Id.* at 566.

In advocating an exhaustion doctrine, *amicus* respectfully asks that this Court re-examine the fundamental purpose of such a requirement in the administrative arena. The Court has stated, "The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi* v. *Davidson,* 405 U. S. 34, at 37 (1972).

It is well established law that there must be an adequate administrative process in place as a condition precedent to an exhaustion requirement. Where there is the possibility of fair administrative relief and adequate procedures, there will be a forum that is knowledgable and capable of hearing prisoners' grievances. There will also be agency expertise. With all due respect for the judges of the federal District Courts, it is not likely that their understanding of state prison conditions can compare to administrative hearing officers who examine these allegations of conditions on a daily basis. The contention that

the federal courts are the only fair fora for relief in § 1983 actions is an affront to those involved in the administrative process and a charade by prisoners to place distance between actual prison conditions and those individuals capable of mandating changes. Many prisoners purposely do not seek fair hearings by those who possess knowledge of the source of the grievance. An exhaustion requirement in this respect would do no more than require such hearings, whereas a failure to require exhaustion of administrative proceedings would make such proceedings nothing more than a shell, with administrative expertise being a wasted resource.

Still another sound and compelling policy reason for an exhaustion requirement is that it will serve to bring a speedy resolution of meritorious claims. We again advance such a proposition under the assumption that an adequate administrative procedure is in place. *Amicus* cannot and will not defend a process that summarily denies an overwhelming percentage of claims. However, it is clear that in a fair setting, grievances with merit will be resolved in the most timely and least expensive method by the exhaustion requirement. We believe that all claims for relief would be dealt with in a speedier fashion, since those with true merit would likely be resolved prior to federal filing and those § 1983 suits filed in the federal courts will be heard more expeditiously because of the effect of the administrative filtering and reduced backlog.

The Civil Rights Act of 1980, codified at 42 U. S. C. § 1997e, represents congressional recognition of the need for a strong administrative role in § 1983 suits brought by prisoners. This law sets forth a plan to develop a certification procedure for state prison grievance resolution. While this legislation addresses the problem discussed in this brief, it will not alone resolve it. There is no requirement in § 1997e to exhaust or even pursue state remedies prior to bringing a § 1983 suit.

In September, 1981, U. S. Representative Bobbi Fiedler of the State of California, introduced H. R. 4427. It would amend § 1983 by adding:

> If the plaintiff in an action, suit or other proceeding under this section seeks relief from the conditions of such plaintiff's imprisonment pursuant to State criminal conviction, no relief shall be granted unless the plaintiff exhausted all State remedies, nor shall relief be granted if the plaintiff received an adverse ruling on the claims being presented in the action, suit or proceeding under this section from a State court in a fair proceeding.

This bill, now pending in Congress, takes the steps necessary to resolve the problem created by § 1983 abuses by prisoners.

Notwithstanding possible congressional action, the exhaustion rule is a creature of the courts. This Court now has the opportunity to act on measures which were originally designed to extend appropriate civil rights protections, but which have more recently resulted in judicial backlogs, denial of speedy and inexpensive resolutions, denial of agency expertise, federal control over state-financed and administered institutions, and a demoralization of prison administration. Requiring exhaustion of state administrative remedies where adequate procedures are available will never result in the denial of meritorious claims of prisoners or others in the federal courts. The benefits to the courts, the prisons, the states and the taxpayers make such a requirement well founded, timely and necessary.

CONCLUSION

Amicus respectfully submits that the decision of the former United States Court of Appeals for the Fifth Circuit should be affirmed on the law and on the basis of sound judicial policy.

Respectfully submitted,

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